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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 439

BUTCHERS UNION LOCAL NO. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iv) is not yet officially reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 16-45, 51-62)[1] are reported at 152 N.L.R.B. 1645.

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[1] "R." refers to "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of the unfair labor practice hearing;

JURISDICTION

The decision of the court of appeals was rendered on May 23, 1967 (Pet. App. i). The petition for a writ of certiorari was filed on July 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the Board correctly held that its Regional Director had not approved a proposed settlement agreement of unfair labor practice charges filed against petitioner union.

2. Whether the Board's finding that the union required, in agreement with the employer, that employees join the union and pay dues and initiation fees prior to the expiration of their first 30 days of employment, in violation of Section 8(a)(3) of the Act, was supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Board's Rules and Regulations, are printed in Pet. App. xi-xvii.

"G.C. Exh." refers to the NLRB General Counsel's exhibits; and "Res. Exh." refers to the respondent Union's exhibits. These documents comprised the record in the court of appeals, and certified copies thereof have been filed with the petition.

STATEMENT

A. The Board's Findings of Fact

1. *The unlawful requirement of union membership and dues*

Since 1956, Campbell Soup Company[2] and petitioner union have entered into a series of collective bargaining contracts, each containing a lawful union-security clause providing that new employees must join the union after the 30th day of their employment (R. 52).[3] The practice established by agreement between the company and union, however, was to require new employees to join the union at the time they were first employed and, further to require the payment of dues and initiation fees prior to the 30-day grace period provided by the Act (R. 20, 52; G.C. Exhs. 13, 14, Tr. 156-170). Thus, following a physical examination and other preliminaries, each employee applicant was asked by the company's personnel clerk whether he was a member of the union. If not, he was informed that he would have to join and was simultaneously handed membership applica-

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[2] The company was co-respondent with the union before the Board and court of appeals.

[3] Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to encourage union membership by discrimination in employment conditions, but provides in pertinent part "That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment * * *."

tion and "voluntary" dues deduction forms, which he was told to sign. He was further informed that the union initiation fee was $25 and monthly dues were $4 and that, therefore, the company would deduct $14.50 from his third and fourth weekly paychecks (R. 19, 20, 52; Tr. 31, 54, 74, 78, 81, 98, 103-104, 120; G.C. Exhs. 4-12).

All employee-applicants immediately signed the union forms submitted to them, it being understood by them as well as the company and union that this was one of the conditions of employment (R. 52, 53). Thus, the company personnel clerk told applicant Young that she "would have to join the union in order to go to work" (Tr. 53-54). When applicant White asked the clerk whether it was compulsory to sign, she was told that "this is the way that they did it" (Tr. 31). Applicant Alami "signed the forms I had to sign" because "I thought that was my only choice" (Tr. 74, 78). The union's business agent, Weborg, came to the company office once a week to pick up the list of newly-hired employees and their union application forms (Tr. 136). Also, as they had been told by the company, the employees' union initiation fees and dues covering their first month of employment were withheld from their third and fourth weekly paychecks (R. 52; G.C. Exh. 2). Weborg told the company, prior to each employee's third week of employment, what amounts should be withheld (Tr. 127-128).

Madeline Ritchey applied for employment with the company on April 18, 1963[4] (R. 19; Tr. 103). Fol-

[4] All subsequent dates are in 1963.

lowing the usual procedure, the company personnel clerk told her that there was a union in the plant and gave her the union membership application and dues checkoff forms for signing. Ritchey executed these, and the usual amounts were deducted from her third and fourth weekly paychecks (R. 19, 20; Tr. 103-105, G.C. Exh. 2, p. 4, G.C. Exh. 11). On June 3, Ritchey was lawfully discharged. Thereafter, on two occasions, she phoned the union office to return the dues and initiation fees deducted from her paychecks, but was told that none of the money was returnable since she had worked more than 30 days (R. 20; Tr. 105-106). On July 22, Ritchey filed unfair labor practice charges against the union with the Board's Regional Director, alleging that the membership and dues practices followed by the company and union with respect to her and other employees violated the Act (G.C. Exh. 1(c)).[5]

2. *The Regional Director's rejection of the proposed settlement*

The case was assigned to a Labor Board Field Examiner for investigation,[6] and shortly thereafter, on August 12, the company and the union ceased requiring employees to join the union and pay dues and initiation fees within 30 days of their employment (R. 52, 33; Tr. 161-162). On August 23, in accordance with Section 101.7 of the Board's Statements of

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[5] Similar charges were filed against the company (G.C. Exh. 1(a)). See n. 9, *infra*.

[6] See Sec. 101.4 of the Board's Statements of Procedure, 29 C.F.R. 101.4.

Procedure, 29 C.F.R. 101.7,[7] the Field Examiner wrote to the union (Pet. App. xviii) concerning possible disposition of the case by informal settlement. After noting the enclosure of "copies of the proposed Settlement Agreement and Notice for your perusal and signature," the Field Examiner stated:

> I want to note that the proposed Settlement Agreement is based upon my opinion and is being recommended by me subject to the approval of the Regional Director.

Similarly, the enclosed proposed Settlement Agreement (R. 39) provided that "the undersigned * * * Union and charging party * * * in settlement of the above matter, and subject to the approval of the Re-

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[7] Section 101.7 provides:

> *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

gional Director * * *, hereby agree as follows"; that "Upon approval of the Agreement, the Union will post * * * copies of the notice attached hereto * * *"; and that "Performance by the Union with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director. * * *" The proposed agreement contained blank spaces for the signatures of the "Union," the "Charging Party," the "Board Agent" who "Recommended" the Agreement, and the "Regional Director" who "Approved" it.

In discussing the substantive terms of the proposed agreement (Pet. App. xviii), the Field Examiner further stated that the charging party, Ritchey, would be entitled to a refund of her first month's dues but, since she had worked more than 30 days, would not be entitled to the refund of her initiation fee. He then added that, although there was some evidence that other employees might be entitled "to participate in the remedy called for in this case, please note that the Settlement Agreement, as proposed, when agreed to contemplates extension of the remedy only to the Charging Party." On August 26, the union asked the Field Examiner about the meaning of the proposed remedy (Pet. App. xx), and on August 27, the Field Examiner replied (Pet. App. xxiii): "Your understanding * * * that upon execution of this Settlement Agreement there will be no claimed violation with respect to any employees up to the time of the expiration of the settlement is correct."

By early September, the union had signed the proposed settlement agreement, and Ritchey had been

reimbursed $4 for her first month's dues. But the Regional Director refused to approve the proposed agreement, because it provided a remedy only for Ritchey, although all newly hired employees had been subjected to the same unlawful practice. Accordingly, the proposal was withdrawn on September 20, and a new one was submitted on September 26, providing for reimbursement of unlawfully withheld dues and initiation fees to all employees hired after January 22, 1963[8] (R. 53-54; Res. Exh. 10, G.C. Exh. 16 (F)). On October 1, the union's counsel rejected the new proposal, stating (R. 25-26; G.C. Exh. 16(G)):

> As we have previously indicated to you in rather certain terms, we will not recommend such a settlement to our clients, and believe that any settlement should run only towards the charging party and towards no other person, particularly since we are dealing with the question of a subjective state of mind on the issue of voluntariness.
>
> Accordingly, unless we can have a reconsideration of the original settlement agreement already agreed to by our principals, we can see no choice but to proceed with litigation in this case.

The Regional Director then issued the instant complaint.

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[8] January 22 was chosen as the cutoff date because Section 10(b) of the Act precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board" and Ritchey filed her charges on July 22 (G.C. Exh. 1(c)).

B. The Decisions of the Board and of the Court of Appeals

Upon the foregoing facts, the Board concluded that no settlement agreement had been reached which precluded the issuance of the instant complaint. The Board found that, in the circumstances of this case, the union in fact recognized that the settlement first proposed by the Field Examiner was "tentative," had "to be submitted to the Regional Director for approval," and "had not been approved by the Regional Director" prior to its withdrawal on September 20. Moreover, the Board held that, in order to avoid "possible confusion and misunderstanding as to whether or not a settlement has been effectuated," "it is necessary that the Regional Director expressly approve in writing the offered settlement in its totality after all the disputed issues are resolved." (R. 53-54.) Finally, the Board found on the merits that the union had violated Section 8(b)(2) and (1)(A) of the Act, by its practice with the company of requiring that new employees, as a condition of employment, join the union and pay dues and initiation fees prior to the expiration of the 30-day statutory period (R. 52-53, 56).[9] The Board's order, *inter alia*, required the union to cease and desist from the unfair labor practices

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[9] The Board also found that the company violated Section 8(a)(1), (2) and (3) of the Act by "telling applicants for employment that they had to join the Union," submitting to them membership applications and authorizations for dues deduction, and deducting such fees, all prior to the 30-day statutory period (R. 53, 56). These findings, which were affirmed by the court of appeals, are not challenged by the union here, but see the company's companion petition, No. 525, O.T., 1967.

found; to reimburse employees hired within six months prior to the filing of the unfair labor practice charges [10] for dues deducted for the first month of their employment; and to reimburse the initiation fees of those who had not worked more than 30 days (R. 55, 58-59).[11]

The court of appeals sustained the Board's findings and enforced its order (Pet. App. i-iv).

ARGUMENT

The decision of the court of appeals, which turns on the special facts of this case, is correct and is not in conflict with the decision of any other court of appeals. There is no occasion for further review.

1. As this Court has held, "With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices." *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 253. In Section 101.7 of its Statements of Procedure, 29 C.F.R. 101.7, the Board has provided for the consideration of settlements before any complaint is issued. This

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[10] See n. 8, *supra*.

[11] As the Board pointed out (R. 55), "all employees who worked more than 30 days would have paid [initiation] fees pursuant to the lawful union-security clause" and, therefore, they were not entitled to reimbursement of such fees.

A similar order was entered against the company; its reimbursement obligation was made joint and several with the union's (R. 55, 57-58). The company is challenging the order against it in its pending petition in No. 525.

provision expressly makes all such settlements "subject to the approval of the regional director," who, as the Board noted (R. 54), "has a duty to review each proposed settlement with a view toward assuring that the public interest as well as the private rights of the immediate litigants are served." Following this procedure here, the Field Examiner proposed a settlement agreement to the union, expressly making it subject to the approval of the Regional Director. The Regional Director rejected the proposal because it did not provide a complete remedy for the unfair labor practice committed by the union. Accordingly, the Board quite properly determined that no settlement had been reached which precluded the issuance of the instant complaint.

The union's principal contention (Pet. 7-9)—that the settlement proposed here was entered into with the implicit approval of the Regional Director and that his subsequent action therefore constituted an improper repudiation of the agreement—is unsupported by the facts of record. As shown in the Statement, *supra*, pp. 5-8, the Board's Field Examiner carefully pointed out to the union at the outset of negotiations on August 23 that the proposed settlement was "based upon my opinion and is being recommended by me subject to the approval of the Regional Director." The proposal itself expressly provided in numerous places that it was subject to the Regional Director's approval and provided a space for his signature as well as that of the Field Examiner. The further communication of record from the Field Examiner to the union pertained to the meaning of

the proposed remedy and in no way indicated that the Regional Director had approved the agreement (Pet. App. xxii).[12] And there was no communication between the Regional Director himself and the union. Finally, when the proposed settlement was withdrawn on September 20 and a new one substituted on September 26, the union in no way suggested that the Regional Director was thereby repudiating an agreement which he had already approved. Instead, its attorneys asserted (Pet. App. xxix) that the broader remedy provided in the new proposal was not acceptable and that, "unless we can have a reconsideration of the original settlement agreement already agreed to by our principals, we can see no choice but to proceed with litigation in this case." In these circumstances, the Board was amply warranted in finding that the Regional Director had in no way approved the original proposal and that the union in fact recognized this at all times.[13]

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[12] Indeed, in discussing the wording of the proposed notice to be posted by the union, the Field Examiner said, "I do not feel the Regional Director will object to dropping the word 'illegal'" (Pet. App. xxii), thereby clearly indicating that the agreement had not yet been approved by the Regional Director.

[13] The union's reliance on *Wallace Corp.* v. *National Labor Relations Board, supra,* and the Board decisions cited on p. 7 of the petition, is misplaced, since in those cases the Regional Director admittedly had approved the settlement, the issue being whether the Board was thereby precluded from considering the unfair labor practices embraced by the settlement.

Equally inapposite is *Sherry & Gordon Co., Inc.,* 107 N.L.R.B. 113 (Pet. 9-10), where the Board's Field Examiner expressly "informed the Respondent Union's counsel that the Regional Director had approved the withdrawal of charges"

2. If these findings were proper, the union cannot complain (Pet. 9-13) about the Board's further holding that the only appropriate method by which the Regional Director may give his approval to a settlement agreement is to sign it in writing. In any event, this requirement is admittedly (Pet. 12) within the Board's "power to fashion its procedure" for the "settlement of disputes" (*Wallace, supra,* at 253); as the Board noted (R. 54), "[a]nything short of this position opens the door to possible confusion and misunderstanding as to whether or not a settlement has been effectuated * * *." Nor was the union prejudiced by the requirement of a signed writing here. The settlement proposal was embodied in one of the Board-prepared forms referred to in Section 101.7 of the Board's rules; it was expressly made subject to the Regional Director's approval; and the only method of approval indicated was the provision of a space at the end for the signature of the "Regional Director" under the word "Approved" (R. 40).[14]

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in accordance with the proposed settlement agreement. *Id.*, at 113-114, 115. As shown above, no such representation was made by the Field Examiner here.

[14] The requirement of the Regional Director's signature does not constitute a reversal of the Board's decision in *Sherry & Gordon Co., Inc., supra,* as the union contends (Pet. 9-10). There the Board merely held that it would not stand on this requirement where a Board agent expressly represents that the Regional Director has in fact given his approval. See n. 13, *supra.* Here no such representation was ever made.

Contrary to the union's further suggestion (Pet. 14), the Section 10(b) limitation period (see n. 8, *supra*) is calculated from the date of the original charge and not the

3. The union's contention on the merits (Pet. 14-16)—that the newly hired employees *voluntarily* joined the union and paid dues and initiation fees prior to the expiration of the 30-day statutory period—raises a mere "substantial evidence" question which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503. Moreover, the record facts summarized in the Statement (*supra*, pp. 3-5) amply support the Board's finding, sustained by the court below (Pet. App. ii), that the employees did not act voluntarily, but were compelled as a condition of employment, in violation of Section 8(b)(2) and (1)(A) of the Act. Accord: *National Labor Relations Board* v. *Cadillac Wire Corp. and Local 810, Teamsters*, 290 F. 2d 261 (C.A. 2), enforcing 128 NLRB 1002, 1005-1006.[15]

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amended charge, where, as here, the amended charge does not introduce a new cause of action. *National Labor Relations Board* v. *McCloskey & Company, Inc.*, 255 F. 2d 68, 70-71 (C.A. 3); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413 (C.A. 10).

[15] There is no merit to the union's contention (Pet. 15) that the Board, having reversed the Trial Examiner on the settlement issue, was required to remand the case to him for his findings on the merits. While the Trial Examiner did not make any ultimate findings on the merits, he did hold a complete hearing thereon. And it is well settled that the Board may "make its findings and predicate its orders upon the written record without hearing the witnesses testify or availing itself of findings and recommendations prepared by the officer who heard and observed the witnesses testify." *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 453 (C.A. 3). Moreover, 5 U.S.C. 557(b) provides that where, as here,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1967.

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there is an appeal to the agency from the "initial decision, the agency has all the powers which it would have in making the initial decision. * * *" Finally, the Trial Examiner did make many subsidiary findings upon which the Board relied, and the record evidence itself was largely undisputed and raised no substantial credibility question.

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